

RICHARD BOULAIS  
d/b/a PRIVATE LINE COMMUNICATIONS

IBLA 87-370

Decided February 2, 1989

Appeal from a decision of the Area Manager, Phoenix Resource Area, Arizona, Bureau of Land Management, requiring payment of balance of rental due for communications site right-of-way. A-21358.

Set aside and remanded.

1. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rent--Rights-of-Way: Appraisals

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

APPEARANCES: Richard Boulais, pro se; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Richard Boulais d.b.a. Private Line Communications (PLC) has appealed from a decision of the Area Manager, Phoenix Resource Area, Arizona, Bureau of Land Management (BLM), dated January 15, 1987, requiring payment of the balance of the rental due for communications site right-of-way A-21358.

Effective January 31, 1986, BLM issued, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1761 (1982), a 20-year right-of-way to Boulais d.b.a. PLC for the construction, operation, and maintenance of a mobile radio relay system involving a portable building and an antenna tower to be located on sixteen one-hundredths of an acre of land situated in tract 37 (formerly sec. 27), T. 3 N., R. 3 W., Gila and Salt River Meridian, Maricopa County, Arizona, on the White Tank Mountains 28 miles west of Phoenix, Arizona. The right-of-way grant was expressly issued subject to "subsequent appraisal" regarding appropriate rental fees and provided that the holder agreed "to pay the BLM

upon demand those fees determined by appraisal to represent the fair market rental for the use of the public lands involved in the grant." See 43 CFR 2803.1-2(b) (1986); Jancur, Inc., 93 IBLA 310, 312-13 (1986).

In order to determine the fair market rental value of the subject right-of-way, Daniel H. Nowell, a BLM appraiser, prepared an Appraisal Report on December 22, 1986, which report was approved by the Chief State Appraiser on January 12, 1987. In the report, Nowell calculated the fair market rental value of the subject right-of-way employing the comparable lease method of appraisal.

Based on a determination that the highest and best use of the subject tract of land atop the White Tank Mountains was communications site use, Nowell selected nine leases and one sale of land for communications site purposes in Arizona and neighboring states. Nowell then compared these leases and sale with the subject right-of-way on the basis of various factors considered to affect rental value, viz., demographic coverage for communications purposes, location of the site, time of the transaction, type and quality of access, power availability and dependability, lease terms, and physical character of the land, rating the leases and sale as either inferior or superior to the subject right-of-way. Based on this analysis, Nowell concluded that the subject right-of-way fell within a range of rental values for these leases and sale from \$9,650 to \$5,000, "with a central tendency formed just above \$5000 per year," and concluded that the fair market rental value of the subject right-of-way as of December 19, 1986, was \$5,500 per year (Appraisal Report at 21).

Based on the appraisal report, the Area Manager, in his January 1987 decision, required Boulais d.b.a. PLC to pay the balance of the rental due (\$10,900), viz., annual rental charges of \$5,500 for the 2-year period beginning with the date of issuance of the grant less the advance rental already deposited with BLM, within 30 days from receipt of the decision. Boulais d.b.a. PLC has appealed from the Area Manager's January 1987 decision. 1/

1/ In actuality, BLM received, on Jan. 27, 1987, a request from Boulais d.b.a. PLC for a "hearing" regarding the appraisal of the right-of-way. It was not until Mar. 27, 1987, that BLM received a document specifically denominated a notice of appeal from the appraisal. The applicable regulations regarding communications site rights-of-way issued pursuant to section 501 of FLPMA, unlike regulations implementing prior statutory authority, do not provide for a hearing as a matter of right on the question of the propriety of a fair market rental value determination by BLM. See Pacific Bell, 104 IBLA 66, 67-68 (1988); Cole Industries, Inc., 82 IBLA 289, 290-91 (1984); American Telephone & Telegraph Co., 61 IBLA 343 (1982). A hearing will only be ordered now, pursuant to 43 CFR 4.415, where the Board determines that there is a material question of fact. See Colorado-Ute Electric Association, Inc., 79 IBLA 53, 55-56 (1984). Nevertheless, we will construe the request for a hearing as a timely notice of appeal since it essentially challenged the appraisal. In addition, we are informed by BLM's Mar. 27, 1987, transmittal memorandum that Boulais d.b.a. PLC notified BLM in a telephone conversation that the appeal was taken from the Area Manager's January

In his statement of reasons for appeal (SOR), appellant challenges the BLM appraisal on a number of grounds. Appellant's principal contention is that the appraisal failed to consider a significant comparable lease for a mobile radio relay system situated on South Mountain Park, also serving the Phoenix metropolitan area. Appellant argues that the South Mountain Park site, which rented for \$4,800 as of January 1, 1987, is vastly superior to the White Tank Mountains site in terms of demographic coverage, type and quality of access, and power availability and dependability. He concludes: "A rent of \$5,500.00 per year on White Tank makes no sense when South Mountain Park is \$4,800.00" (SOR at 3). Appellant also objects to the failure generally to consider leases where rental charges were based on the value of improvements, consideration of out-of-state leases, and the fact that the appraised rental value translates into a per-acre rental value of \$35,942, "comparable to prime land in downtown Phoenix" (SOR at 5). Finally, appellant asserts that the appraisal was "biased" (SOR at 5). Accordingly, appellant requests that the appraised rental value be reduced to \$1,800 to reflect the existing rent at the time the subject right-of-way was granted or, alternatively, that the rental value be determined on the basis of the "area [and] \* \* \* location on the mountain" of the right-of-way (SOR at 6). BLM has filed a response to appellant's SOR.

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. | 1764(g) (1982), requires the holder of right-of-way issued pursuant to FLPMA to pay annually in advance the "fair market value thereof as determined by the Secretary [of the Interior]," except in certain circumstances where the Secretary finds a lesser charge "equitable and in the public interest." Where BLM has appraised the fair market value of a right-of-way, we have consistently held that such appraisal will not be overturned on appeal unless there is demonstrated error in the appraisal method used or convincing evidence establishes that the appraised value is excessive. Tortoise Communications, 105 IBLA 193, 194 (1988), and cases cited therein.

Initially, we note that appellant has not challenged BLM's selection of the comparable lease method of appraisal. We have long held that such method is the preferred method for determining the fair market rental value of communications site rights-of-way when there is adequate data. Harvey Singleton, 101 IBLA 248, 250 (1988); Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978). Further, current regulations endorse the use of a "market survey of comparable rentals." 43 CFR 2803.1-2(c)(3)(i).

Appellant contends that there were certain errors in application of the chosen method, primarily focusing on the appraisal's purported failure to consider a significant comparable lease. Appellant does not identify that lease except to say that it constitutes authorization by the city of Phoenix to use a mobile radio relay site on the South Mountain Park at an initial

fn. 1 (continued)

1987 decision, rather than the appraisal. In view of the fact that Boulais d.b.a. PLC was effectively notified of the results of the appraisal to which he objects by the Area Manager's January 1987 decision, we will likewise treat the appeal as taken from that decision.

rental of \$2,400, subsequently increased to \$4,800. Appellant describes South Mountain Park as the "premier [mobile radio relay] site serving the Phoenix metropolitan area" (SOR at 2).

We note that the 9 comparable leases relied upon by BLM in its appraisal were selected from a pool of 22 leases identified by the appraiser in Arizona and neighboring states. One of the 13 leases not considered by BLM was identified as located in Phoenix, Arizona, and subject to an annual rental of \$2,400 as of the date of appraisal. On appeal, BLM confirms that this is the South Mountain Park lease referred to by appellant. See Answer at 3.

The appraisal, however, does not indicate the specific basis for selection of the 9 comparable leases from among the pool of 22 leases except to state that "[l]eases considered to be the most relevant to the rental valuation of the site under appraisal have been selected" (Appraisal Report at 13). Moreover, there is no indication of the specific reason for disregarding the lease to which appellant refers.

Appellant reports that the BLM appraiser, in response to a question from appellant, stated that the South Mountain Park lease was not considered "because the rent was unrealistically low due to political considerations" (SOR at 2). On appeal, BLM confirms that the rental charge is considered to be "unrealistically low" (Answer at 3). As support for this assertion, BLM points to the "consensus of the data," citing, for example, the fact that two of the comparable leases relied upon by BLM (Nos. 4 and 9, situated southeast, respectively, of Phoenix and Casa Grande, Arizona), which leases would both be considered inferior to the South Mountain Park site, were subject to annual rentals of \$7,800 and \$4,000. Id. at 3. BLM also points to the fact that the rental for the South Mountain Park lease is "unreliable" because it is a renegotiated rental. Id. at 4.

We are not persuaded that the rental charge for the South Mountain Park lease is "unrealistically low." Taken as a whole, the comparable leases relied upon by BLM indicate only that there is a range of rental values among comparable leases and that, in arriving at the appraised rental value of the subject right-of-way, BLM concentrated on the "central tendency" in the rental data (Appraisal Report at 21). Thus, BLM clearly discounted comparable lease No. 4, which had an annual rental of \$7,800, although it was considered inferior to the subject right-of-way, where the "central tendency formed just above \$5000 per year," while, on the other hand, BLM relied on comparable lease No. 9, which had an annual rental of \$4,000, as setting the lower end of the range where it was considered inferior to the subject right-of-way. Id. The South Mountain Park lease clearly fits generally within the range of values and falls close to the "central tendency" in the overall data.

Nor are we persuaded to disregard the rental for the South Mountain Park lease because it is a renegotiated rental. In American Telephone & Telegraph Co., 77 IBLA 110, 119 (1983), we expressly disallowed the use of "renegotiated private leases" as comparable leases because of the "substantial danger that, owing to a disparity in bargaining power [where the lessee

was essentially 'locked-in' by his substantial commitment in improvements], the lessor took advantage of his dominant position." BLM admits, however, that, in the case of the South Mountain Park lease, the lessor "has not taken advantage of its dominant bargaining position" (Answer at 4). Further assurance that the rental was not the result of the exertion of a lessor's unequal bargaining power is provided by the fact that the lessor is not a private entity, but, rather, the city of Phoenix, which is presumably constrained at the very least by considerations of public trust from overreaching. Cf. American Telephone & Telegraph Co., 77 IBLA at 119 n.5 (distinguishing renegotiated Government leases).

Our review of the record indicates that BLM has failed to establish any reason to regard the South Mountain Park lease as an unreliable indicator of the fair market rental value of the subject right-of-way because it is not comparable to that right-of-way, or the rental charged under the lease is not reflective of the interplay of free market forces. Accordingly, we conclude that BLM has not properly substantiated its basis for not considering the South Mountain Park lease.

In these circumstances, the proper course of action is to set aside the Area Manager's January 1987 decision and remand the case to BLM for a reappraisal of the subject right-of-way, giving due consideration to the South Mountain Park lease and all other comparable leases. Communications Enterprises, Inc., 105 IBLA 132, 135 (1988); Paradise Oil, Water & Land Development, Inc., 68 IBLA 268 (1982); Denver & Rio Grande Western Railroad Co., 58 IBLA 4 (1981). On remand, BLM should afford appellant an opportunity to submit such information it believes to have a bearing upon the fair market rental value of the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

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John H. Kelly  
Administrative Judge

I concur:

R. W. Mullen  
Administrative Judge